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In the Supreme Court of the United States

OCTOBER TERM, 1978

LEWIS DAVIS MICHEL AND
JOHN HANDY JONES, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 588 F. 2d 986.

JURISDICTION

The judgment of the court of appeals was entered on February 1, 1979. Petitions for rehearing were denied on March 2, 1979 (Pet. App. 33a). The petition for a writ of certiorari was filed on March 30, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners were prejudiced by evidence admitted against a co-defendant.

2. Whether the prosecution of petitioners violated the Department of Justice policy respecting dual prosecution.

3. Whether the Double Jeopardy Clause precluded prosecution of petitioners in federal court following their conviction in state court on related offenses.

4. Whether petitioner Jones' conviction on count 13 of the indictment was obtained through evidence seized following an assertedly illegal detention of a U-Haul truck.

5. Whether petitioners were prejudiced by an allegedly improper remark made by the prosecutor in closing argument.

STATEMENT

1. Following a jury trial in the United States District Court for the Northern District of Texas, petitioners were convicted of various offenses charged in a 17-count indictment and involving the importation of marijuana into the United States, in violation of 21 U.S.C. 952(a), 960, and 963 (Pet. App. 2a-3a).[1] Petitioner Michel was convicted on counts 1 (conspiracy) and 10 (importation), and sentenced to concurrent terms of five years' imprisonment, to be followed by a three-year special parole term (S. Tr. 27).[2] Petitioner Jones was convicted

[1]The first count of the indictment charged a conspiracy among 19 named defendants and others to acquire marijuana in Mexico and transport it to Dallas, Texas, and other areas of the United States, in violation of 21 U.S.C. 963. Counts 10, 11, and 12 charged petitioners and others with importation offenses in violation of 21 U.S.C. 952(a) and 960 and 18 U.S.C. 2. Count 13 charged an importation offense against Jones and another defendant. In count 14, Jones and another defendant were charged with an additional act of importation (Pet. App. 2a-3a).

[2]"S. Tr." refers to the transcript of the sentencing proceeding.

on count 1 (conspiracy), and counts 10, 13, and 14 (importation). His five-year concurrent sentences on counts 10 and 13 were made consecutive to the concurrent five-year terms imposed on counts 1 and 14. He was also sentenced to serve three years of special parole (S. Tr. 15, 17-18).

2. The evidence at trial established the existence of a loosely organized enterprise, operating over a period of approximately two years, which imported large quantities of marijuana from Mexico into the United States. The government proved its case primarily through the testimony of witnesses who actually participated in the purchase, importation, and transportation of the marijuana (Pet. App. 4a-5a).

The central figure of the group was Robert Belmares. Before 1975, Belmares and others had begun an operation in which marijuana was smuggled from Mexico by backpack and was transported to a destination within the United States. Belmares hoped to expand the operation and increase the profits by importing the marijuana from Mexico by airplane (Tr. 949-951).

By January 1976, additional people were involved in Belmares' venture. Petitioner Jones, a pilot, referred to Belmares as his "partner," and petitioner Michel served as a go-between for Jones and Belmares and met the flights when they landed in the United States (Tr. 501, 643-644, 2018). Belmares frequently visited Jones' office to inform him that a load of marijuana was ready to be picked up in Mexico (Tr. 638-639). On one occasion in early 1976, Michel and government witness William C. White were in Jones' office when Jones received a call from Mexico concerning the transportation of marijuana (Tr. 640). On another evening, Michel called White and asked for a meeting at an airstrip in Dallas. Michel explained that he

had planned to meet Jones at a clandestine site near Cleburne, but that Jones had passed over the site and was low on fuel. White proceeded to Love Field and met Jones; he watched as Jones and Michel loaded the marijuana into a van and drove it away (Tr. 731-735).

In order to secure a "protected" landing site in the United States, Jones offered a bribe to the chief of police of Addison, Texas, who pretended to accept the offer. In return for the money, Jones expected both non-interference with landings at the Addison airport and early warning of impending law enforcement actions (Tr. 2649). The Addison airport was used in May and June 1976 for several trips in which Jones and Michel were actively involved (Tr. 2525-2541, 2651-2684, 2872). In fact, the Addison police chief was cooperating with other law enforcement agents, and Michel, Jones, and others were arrested at the Addison airport in late June (Tr. 2677-2684).

While jailed after his arrest in Addison, Jones became acquainted with Dueal Ray Hulsey, who pretended to be a pilot. They discussed marijuana smuggling at that time, and in late October 1976, Hulsey met with Jones and Belmares. Belmares asked Hulsey to go to Mexico and to a location in Texas to look at damaged planes and determine whether they could be safely flown, and to consider flying marijuana from Mexico. Hulsey testified that Jones was Belmares' "subcontractor" of pilots (Tr. 1783-1802) and that Belmares was in charge of the details and scheduling of the trips (Tr. 1807-1808, 1830, 1831).

During November and December 1976, Jones and another pilot made several flights, until December 9, 1976, when the other pilot was arrested and Jones' plane crashed in Beerville, Texas (Tr. 1424-1441, 1709-1711, 2322-2332, 2851).

ARGUMENT

1. Petitioners contend (Pet. 7-10) that they were prejudiced by the testimony of Douglas Spitler concerning prior acts of importation. Spitler testified that he, co-defendant Jim Wood, and one McVey had imported marijuana on several occasions between January and April 1976 (Tr. 1366-1389). It was not until late spring of 1976 that Spitler and Wood joined forces with the Belmares-Michel-Jones conspiracy (Tr. 2025-2030). The thrust of petitioners' contention is that the admission of the evidence caused a spillover effect, i.e., that the jury may have cumulated the evidence and improperly considered it against petitioners, although it referred to events that occurred before the conspiracy of which they were a part (Pet. 4-5).

Accepting for purposes of argument that petitioners did not assume liability for prior activities of the Spitler group when they knowingly merged with it (but see *Blumenthal* v. *United States*, 332 U.S. 539, 559 (1947)), their claim is nonetheless insubstantial. As the court of appeals stated (Pet. App. 30a): [T]he instructions given by the trial judge * * * were adequate to minimize the possibility of cumulation of the government's evidence." The judge charged the jury on three separate occasions (Tr. 8, 29, 3586-3587) to give "separate and personal consideration to the case of each individual defendant," and thoroughly instructed the jury concerning the government's burden of proof. The fact that the jury returned 37 separate verdicts, of which 20 were convictions and 17 were acquittals, supports the inference that the jury considered the evidence as to the defendants and the counts individually. In any event, the evidence of petitioners' involvement in the conspiracy and the importations for which they were convicted was so

substantial that the admission of Spitler's testimony, even if error, could not have affected the verdict against them.

2. Petitioners also assert (Pet. 12-14) that the Department of Justice violated its policy against dual state-federal prosecutions (hereafter the "*Petite* policy") by prosecuting them after their trials in state court on related charges. In particular, they assert that their federal prosecution was improper because it had not been authorized at the time they were brought to trial.

a. Prior to their indictment in this case, both petitioners pleaded guilty in state court to a charge of possessing marijuana on June 20, 1976. The subsequent federal indictment charged both petitioners with conspiring to import marijuana over a two-year period that encompassed June 20, 1976, and also charged Jones with importation of marijuana on June 20, 1976.[3]

Prior to the filing of the government's brief in the court of appeals, the Acting Assistant Attorney General authorized Jones' prosecution nunc pro tunc. After Michel filed his petition for a writ of certiorari, the Attorney General approved his prosecution on a nunc pro tunc basis (June 17, 1979).

b. Since the *Petite* policy is an exercise by the Department of Justice of prosecutorial discretion, we submit that the Department's pursuit of a particular prosecution is not subject to judicial review except in unusual circumstances not present here. See *Bordenkircher* v. *Hayes*, 434 U.S. 357 (1978); *United*

[3]Although the possession of marijuana on June 20, 1976, was but one small part of the conspiracy later charged, we assume the two offenses to have arisen out of "a single transaction" for purposes of the *Petite* policy. See *Petite* v. *United States*, 361 U.S. 529, 530 (1960).

States v. *Nixon*, 418 U.S. 683, 693 (1974); *United States* v. *Fritz*, 580 F. 2d 370, 374-375 (10th Cir. 1978) (en banc).[4] Moreover, the authorization to prosecute this case, while not sought at the preferred preindictment stage, was nonetheless consistent with the *Petite* policy as heretofore followed by the Department, and the authorization decision served the interests the policy was created to protect.

In cases in which a prosecution has been initiated without prior approval under the *Petite* policy, and it is subsequently determined that the prosecution was not justified by compelling reasons, the Department has in the past sought dismissal of the indictment even after a conviction has been obtained and affirmed on appeal; it expects to adhere to this policy. See, e.g., *Rinaldi* v. *United States*, 434 U.S. 22 (1977); *Hammons* v. *United States*, vacated and remanded, No. 77-6536 (Oct. 2, 1978); *Frakes* v. *United States*, vacated and remanded, 435 U.S. 911 (1978). However, when it has been determined that a prosecution initiated without prior authorization is nonetheless justified by compelling reasons, it has been the practice of the Department to authorize the prosecution nunc pro tunc. See *Welch* v. *United States*, cert. denied, No. 77-6684 (Oct. 2, 1978); *United States* v. *Malizia*, cert. denied, 435 U.S. 969 (1978).

This procedure does not contravene the *Petite* policy or prejudice the defendant. Nunc pro tunc authorizations are governed by the same standards and are processed in the same manner as timely authorizations. Thus where, as here, the prosecution is authorized nunc pro tunc, the

[4]Limited judicial review may be available on a claim of discriminatory enforcement (see *Bordenkircher* v. *Hayes*, *supra*, 434 U.S. at 364), but no such claim is or could be raised here.

defendant stands in the same position as if a timely authorization had been sought, and he has no ground for complaint.

3. There is no merit in petitioners' contention (Pet. 10-13) that their prosecution in federal court following conviction in state court on related offenses was precluded by the Double Jeopardy Clause. This Court has held that in order for the Double Jeopardy Clause to apply, the second prosecution must be by the same sovereign, for the same offense. *Abbate* v. *United States*, 359 U.S. 187 (1959); *Bartkus* v. *Illinois*, 359 U.S. 121 (1959). See also *United States* v. *Wheeler*, 435 U.S. 313 (1978); *Rinaldi* v. *United States*, *supra*. Accordingly, petitioners' conviction in Texas state court on a charge of possession of marijuana followed by their prosecution in federal court on related charges did not violate the Double Jeopardy Clause.[5]

4. Petitioner Jones argues (Pet. 14-16) that his conviction on count 13 of the indictment should be reversed because it was based on evidence derived from an allegedly illegal search of a truck by the Dallas County Sheriff's Department. Jones does not challenge the search itself, which was authorized by a warrant; his claim is rather that the facts supporting the warrant were discovered through an illegal detention of the truck.

Because the sentence Jones received on count 13 was equal to and concurrent with the sentence imposed under count 10, there is no need to review this claim. Moreover, because Jones does not assert any proprietary or

[5]*Ashe* v. *Swenson*, 397 U.S. 436 (1970), on which petitioners rely, is not to the contrary. *Ashe*, which prohibits a state from relitigating an issue of fact that was determined in a prior prosecution, does not alter the dual sovereignty concept, nor would it apply when the original proceeding resulted in a conviction.

possessory interest in the truck searched, he is not entitled to challenge the search. *Rakas* v. *Illinois*, No. 77-5781 (Dec. 5, 1978). In any event, as the court below held, in a thorough analysis on which we rely (Pet. App. 17a-21a), the initial stop of the vehicle was legal and the subsequent search accordingly untainted.

At approximately midnight on May 21, 1976, the manager of the Lancaster, Texas, airport telephoned Dallas County Deputy Sheriff Oxford and reported that cargo was being transferred from an airplane to a U-Haul truck at the far end of a runway. Oxford, who had been investigating activities at the airport for several months to determine whether it was being used as a loading strip for smuggling operations, went to the airport and learned that the U-Haul had left the airport travelling toward Interstate 635. He then initiated a radio broadcast to stop the truck. As the court of appeals noted (Pet. App. 20a), at the time the directive to stop the truck was issued, Deputy Oxford had knowledge of the following facts: (1) two hours after the airport closed, the U-Haul had been parked beyond the runway with its lights on, but the driver had turned the lights off while driving past the airport terminal; (2) three people transferred cargo from the plane to the truck in an area of the airport not normally used for cargo transfer; and (3) the truck travelled from the airport toward an interstate highway by driving through open fields rather than past the terminal on the paved road (Tr. 134-160, 162-185, 201-230). The foregoing facts supported Deputy Oxford's reasonable suspicion that the U-Haul was being used in criminal activities, and clearly warranted the intermediate response of an investigative stop of the vehicle. See *Terry* v. *Ohio*, 392 U.S. 1 (1968); *Adams* v. *Williams*, 407 U.S. 143 (1972). The fact that the truck was stopped only six miles from the airport, and 15 minutes after the radio broadcast was made (Tr. 145-157), further supports the

reasonableness of the officer's action. See *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 884 (1975); *United States* v. *Hall*, 557 F. 2d 1114, 1117 (5th Cir. 1977), cert. denied, 434 U.S. 907.

5. Petitioners contend (Pet. 17-19) that they were prejudiced by a remark made in the prosecutor's closing argument, which, they claim, improperly referred to facts not in evidence.

Several government witnesses, including William White, testified that as part of their participation in the importation conspiracy, they had occasion to travel on commercial airline flights, purchase fuel, and stay at various motels (Tr. 403, 819, 855-856, 903, 2010, 2526-2528). The government presented documentary evidence corroborating some of this testimony (Tr. 2830-2834, Govt. Exhs. 6-9), and in closing argument, the prosecutor referred to some of the evidence (Tr. 3370, 3377). Thereafter, counsel for petitioner Michel argued that the government had failed to produce receipts or a manifest from Southwest Airlines to substantiate White's testimony about his travels in behalf of the conspiracy (Tr. 3428-3429). Specifically, defense counsel stated that Southwest "is a public conveyance and they have to have a roster list. That wasn't introduced." Counsel for Jones made a similar argument with respect to the testimony of government witness Maggio. He told the jury (Tr. 3517):

> Well, they could get some corroboration from Maggio I think if they went to Austin. It wouldn't be material corroboration. He said he rented a car down there. Where is the rental receipt. Those are still around. He says he flew down there. Where is the airplane tickets. Those are still around.

In rebuttal, the prosecutor stated that the airplane tickets were not available because the airline company destroys tickets after six months (Tr. 3532; see also Tr. 3549). Counsel for Michel joined an objection to the prosecutor's argument; the attorney for Jones expressly waived objection. The court overruled the objection, commenting that the remark was invited and that "I don't think it amounts to too much, anyway" (Tr. 3533).[6]

In these circumstances, Jones has no basis for objecting now to the prosecutor's, comment, having made no objection to it at trial. Nor is there any merit to Michel's contention. Although the remark referred to facts not in evidence, it was a response directly provoked by defense counsel's misleading suggestion, also not based on record evidence, that the tickets "are still around" and that they were not produced because the trips were never taken. This kind of response to the argument of defense counsel is not reversible error. See *United States* v. *Warren*, 550 F. 2d 219, 227 (5th Cir. 1977), cert. denied, 434 U.S. 1016 (1978). See also *United States* v. *White*, 377 F. 2d 908, 910-911 (4th Cir.), cert. denied, 389 U.S. 884 (1967); *United States* v. *Bastone*, 526 F. 2d 971, 988-989 (7th Cir. 1975), cert. denied, 425 U.S. 973 (1976); *United States* v. *Crouch*, 528 F. 2d 625, 633 (7th Cir.), cert. denied, 429 U.S. 900 (1976); *United States* v. *Ivey*, 550 F. 2d 243 (5th Cir.), cert. denied, 431 U.S. 943 (1977).

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[6]When the objection was renewed later, counsel for Jones again waived objection, stating that the error, if any, was "totally harmless," an assessment with which the court agreed (Tr. 3562).

In any event, the prosecutor's remark was "but one moment in an extended trial," *Donnelly* v. *DeChristoforo*, 416 U.S. 637, 645 (1974), and, in the context in which it was made, did not materially prejudice the defense.[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[7]The cases cited by petitioners (Pet. 18-19) are not to the contrary. In those cases, the remarks prompting reversal were unprovoked, were directed to the heart of the defense, were part of a pervasive pattern of gross government misconduct, or were so prejudicial in light of the weakness of the government's evidence that the conviction could not fairly stand.

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